YENG HING ENTERPRISE SDN. BHD. v. DATUK DR. ONG POH KAH

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C.JJ.) 14 November 1987 & 27 February 1988]

[Kota Kinabalu – Supreme Court Civil Appeal No. 522 of 1986]

Civil Procedure – Application for summary judgment – Unconditional leave to defend given – Appeal – Action by company against director of the company – Transfer of company funds to name of director – No resolution of company authorizing transfer of funds – Relief under section 354 of Companies Act 1965 – May be pleaded as part of defence – Question of fact – Should not be determined summarily – Interest – R.H.C. 1980, O. 14 – Civil Law Act 1956, s. 11.

Companies and Corporations – Transfer of funds by director – No resolution of company authorizing transfer – Claim for relief under section 354 of Companies Act 1965 – Question of fact as to what "honestly and reasonably" means – Should not be determined summarily – Companies Act 1965, s. 354.

In this case, the plaintiffs are a company incorporated in Malaysia and the defendant is a director of the company. It was alleged that the defendant, in breach of his duties as trustee, wrongfully and without lawful authority, misapplied a sum of M$3,233,485.97 of the plaintiffs' money which was deposited in a bank, by transferring the money to Hongkong and placing it in his own personal name. The plaintiffs demanded the return of this money and the defendant refunded the total sum of M$3,022,739.47 leaving a balance of M$210,746.50. In his defence, the defendant denied that he had committed any breach of his duties as director or trustee of the plaintiffs and averred that he had acted throughout *bona fide*, honestly and reasonably. He submitted that if he had been guilty of any negligence, default, breach of duty or trust he ought to be relieved from his liability by the court under section 354 of the Companies Act 1965. An action was brought by the plaintiffs against the defendant and application was made for summary judgment under Order 14 of the Rules of the High Court 1980. The learned judge granted the defendant unconditional leave to defend and also held that the defendant was not entitled to relief under section 354 of the Companies Act 1965. The plaintiffs appealed against the order granting to the defendant unconditional leave to defend and the defendant cross-appealed against the ruling in which the learned judge held the defendant was not entitled to relief under section 354 of the Companies Act 1965.

Held, allowing both the appeal and cross-appeal: (1) in this case, no resolution authorizing the diversion of the company's funds to Hongkong had been passed by the board of directors nor was any minute recorded dealing with the matter. When the company demanded the return of the money, the defendant apparently did so without demur. There was considerable suspicion as to the *bona fide* of the defence and therefore leave to defend should be granted conditional upon paying into court the sum of M$210,746.50 claimed, within thirty days from the date of the order, failing which the company shall sign judgment for the amount;

(2) there was no express or implied agreement as to the payment of interest and having regard to the provisions of section 11 of the Civil Law Act 1956, which forbids the giving of interest upon interest, the learned judge was right in giving the defendant (respondent) unconditional leave to defend in this particular claim;

(3) the defendant (respondent) was entitled to plead section 354 of the Companies Act 1965 as part of his defence. The question under section 354 of the Companies Act 1965 should not be determined summarily as it is a question of fact as to what "honestly and reasonably" means and therefore the cross-appeal of the defendant (respondent) should be allowed.

SUPREME COURT.

Miss Anne Wong for the appellant.
Chan Wing Kong for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the judgment of the court): This is an appeal by the plaintiffs against an order of the learned judge granting the defendant unconditional leave to defend the action following an application for summary judgment under Order 14 of the Rules of the High Court 1980. There is a cross-appeal by the defendant against that part of the ruling in which the learned judge held that the defendant was not entitled to relief under section 354 of the Companies Act 1965.

The brief facts leading to this action are as follows:

The plaintiffs are a company incorporated in Malaysia with their registered office at Yeng Ho Hong Industrial Building, 2nd Floor, 1½ Mile, Leila Road, Sandakan, Sabah. The defendant was and still is a director of the plaintiff company. A total sum of M$3,233,485.97 of the plaintiffs' money was deposited with the Malayan Banking Bhd., Sandakan. It was alleged that between December 1980 and July 1981, the defendant, in breach of his duties as trustee, wrongfully and without lawful authority, misapplied the said M$3,233,485.97 by transferring the same to Hongkong and placing it in his own personal name. Upon discovery of this, the board of directors of the plaintiff company demanded the return of the money from the defendant. The defendant thereupon refunded the total sum of M$3,022,739.47 leaving a balance of M$210,746.50. It seems that the difference of M$210,746.50 represents the fluctuation of the exchange rate when the money was remitted back

to Sandakan. In addition to M$210,746.50, the plaintiffs are also claiming from the defendant compound interest amounting to M$189,472.73 as at 27 April 1984, making a sum of M$400,219.23.

In his statement of defence, the defendant admitted that he remitted M$3,183,485.97 to Hongkong and the total interest earned was HK$176,543.58. He, however, transferred M$50,000.00 to the plaintiffs' account at Chung Khiaw Bank, Sandakan, Sabah, to meet general expenses of the plaintiff company. The defendant alleged that due to a change in the investment climate, he transferred (a) S$1,000,000.00 to a bank in Singapore, (b) another M$1,000,000.00 to a bank in Kuala Lumpur, Malaysia and (c) another M$876,239.47 to Chung Khiaw Bank, Sandakan, Sabah. He denied that he had committed any breach of his duties as a director or trustee of the plaintiff company and further denied he had wrongfully misappropriated any part of the money. The defendant averred that he had acted throughout *bona fide,* honestly and reasonably and if he had been guilty of any negligence, default, breach of duty or trust he submitted that he ought to be relieved from his liability by the court under section 354 of the Companies Act 1965. Lastly, the defendant alleged that in diverting the plaintiff company's funds for business investment purposes in Hongkong, he acted on the view of some of the members of the board of directors of the plaintiff company.

At the hearing of the Order 14 application, learned counsel for the defendant appeared to concede that no resolution authorizing the diversion of the plaintiff company's funds to Hongkong had been passed by the board of directors. Nor was there any minute recorded dealing with this matter. However, the truth of the matter was that when the plaintiffs demanded the return of the money from the defendant, he apparently did so without demur. This seems to raise the *bona fide* of the defence to the plaintiffs' claim to the sum of M$210,746.50 which the learned judge did not appear to consider. If the learned judge had directed his mind to this particular defence, it is doubtful whether he would grant unconditional leave to defend. On our part, we have considerable suspicion as to its *bona fide* and would give the defendant leave to defend the claim of M$210,746.50 conditional upon him paying into court the said sum within thirty days from date of this order, failing which the plaintiffs shall sign judgment for that amount.

With regard to the M$189,472.73 which represented compound interest claimed by the plaintiffs up to 27 April 1984, it was common ground that there was no express or implied agreement as to its payment by the defendant. Having regard to the provisions of section 11 of the Civil Law Act 1956 and in particular proviso (a) which forbids the giving of interest upon interest, we agree with the learned judge that the defendant be given unconditional leave to defend this particular claim.

We come now to the cross-appeal of the defendant.

It was submitted by learned counsel that the learned judge erred in ruling that the defendant was not entitled to relief under section 354 of the Companies Act 1965 without hearing the witnesses which the defendant intended to call at the trial. For the plaintiffs, it was argued that if the defendant was to rely on section 354 he should make his application by way of petition (see Order 88 rule 5(j) of the Rules of the High Court 1980). Order 88 rule 5(j) is *in pari materia* with the corresponding Order 102 rule 5(k) of the English counterpart. Dealing with sub-paragraph (k), the learned authors of *The Supreme Court Practice 1982* states:

> "It is apprehended that no petition can be presented under the subsection after proceedings have been commenced against the person seeking relief in respect of any liability to which the action relates; relief must be applied for in the action under subsection (1). Where proceedings are taken under subsection (1) in a court of summary jurisdiction, the court only has jurisdiction to grant relief in respect of those proceedings (*Re Gilt Edge Safety Glass Ltd.* [1940] Ch. 495) where relief was granted in respect of liability from future claims."

In other words, if action had been taken against the defendant in a court of law, he might plead section 354 of the Companies Act 1965 as part of his defence. There was no need for the defendant to bring a separate suit claiming relief under section 354 of the Act, and thus incurring unnecessary costs. We therefore reject the submission of learned counsel for the plaintiffs, and set aside this part of the ruling. In our opinion, the question under section 354 of the Companies Act 1965 should not be determined summarily as it is a question of fact as to what "honestly and reasonably" means.

For the above reasons we would allow both the appeal and the cross-appeal on the terms set out above. We order that each party is to pay its

own costs. The deposit to be refunded to the plaintiffs.

Appeal and cross-appeal allowed.

Solicitors: *Skinner Lind Robertson Willie Wong & Chin; William Liaw Chan & Co.*

CHUNG KHIAW BANK LTD. v. HIPPARION (M) SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) January 11, 1988]

[Penang – Originating Summons No. 31-91-86]

Land Law – Loan agreement – Deed of assignment – Whether deed of assignment a security relating to land or a security relating to a chose in action – Whether deed of assignment is absolute or by way of charge – National Land Code, ss. 205, 206(3) & 257 – Specific Relief Act 1950, s. 41 – R.H.C. 1980, O. 31 r. 1(1).

Contract – Loan agreement – Deed of assignment – Defendant to remain in possession as contractual licensee – Contractual licensee – Whether deed of assignment is absolute or by way of charge – National Land Code, ss. 205 & 206(3) – Specific Relief Act 1950, s. 41 – R.H.C. 1980, O. 31 r. 1(1).

Companies and Corporations – Absolute assignment – No registration required – Companies Act 1965, s. 108.

The plaintiff, a licensed bank, entered into an agreement ("the loan agreement") with the defendant, an incorporated company, whereby the plaintiff granted a loan ("the loan") to the defendant, repayable with interest. By way of security for the loan, the defendant executed a deed of assignment ("the assignment") whereby it assigned absolutely to the plaintiff all its rights, title and interest in certain immovable property ("the property") and in the sale and purchase agreement. It was further provided in the loan agreement that the defendant would remain in possession of the property only as contractual licensee of the plaintiff and that within seven days after its licence to occupy the property has been terminated, it would have to give immediate vacant possession thereof to the plaintiff, and thereafter the plaintiff would have the right to enter upon the property and to deal with all its rights, title and interest in the property. The defendant defaulted in making payments due under the loan agreement, in consequence whereof the plaintiff, after notification to the defendant, commenced the proceedings herein by way of originating summons praying for *inter alia*, an order for sale of the property.

Held, applying contractual principles to determine the rights and obligations of the parties: (1) the defendant's right to possession of the property *vis-a-vis* the developer is an incident of his rights and benefits under the sale and purchase agreement (under which the defendant was the purchaser and the developer the vendor), which right had been assigned to the plaintiff under the assignment;

(2) the defendant's rights to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff;

(3) the plaintiff had lawfully exercised its right to terminate the licence and was entitled to enter upon the property and to deal with all the rights, title and interest in the property.

(4) if the security constituted by the documents concerned is a security relating to land, it is still a valid security. The requirements of the National Land Code, which concern the creation of a security in respect of land held under registered title, are without application in the present case, as the property is not as yet held under a registered title.

(5) the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a sub-divided building, in respect of which strata title has yet to be issued, this court has jurisdiction under section 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property;

(6) if the security herein is not a security relating to a chose in action, but a security relating to land, then the court would hold that it has jurisdiction under Order 31 rule 1(1) of the Rules of High Court 1980 to make an order for sale of the property.

Cases referred to:

(1) *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.* [1984] 2 M.L.J. 268 (refd).
(2) *Hughes* v. *Pump House Hotel Co. Ltd.* [1902] 2 K.B. 190 (refd).
(3) *Comfort* v. *Betts* [1891] 1 Q.B. 737 (folld).
(4) *Tancred and Others* v. *Delagoa Bay and East Africa Railway Co.* (1889) 23 Q.B.D. 239 (folld).
(5) *Durham Brothers* v. *Robertson* (1898) 1 Q.B. 765 (folld).
(6) *National Provincial Bank* v. *Harle* (1881) 6 Q.B.D. 626 (refd).
(7) *Oldham* v. *Stringer* (1885) 51 L.T. 895 (cited).

ORIGINATING SUMMONS.

Louis Van Buerle (*Miss Lim Seong Lee* with him) for the plaintiff.

Charles Ong for the defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This is yet another one of those cases where a borrower is attempting to avoid repayment of money he has borrowed on purely technical grounds. However, as I have said before, this is not a court of morals but a court of law and so if the borrower is right in its contentions, then it is entitled to succeed.